Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-214

BERKELEY SCHOOL DISTRICT, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Petitioners, Berkeley School District and Joe R. Cox, its Superintendent pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled cause on May 14, 1975.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, is reprinted in the Joint Appendix filed herewith by the three Petitioner-School Districts (A-2-16). The United States District

Court's initial Findings of Fact and Conclusions of Law, reported at 363 F.Supp. 739, and the United States District Court's Findings and Judgment of January 9, 1975, 388 F.Supp. 1058, are reprinted (A-16-45).

JURISDICTION

The Judgment of the Court of Appeals was entered on May 14, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Ninth Amendment:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment:

> Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

42 U.S.C. § 2000(c)(6) (A-105).

20 U.S.C. §§ 1751, 1752, 1754, 1755 and 1757 (A-107).

Constitution of Missouri:

Article X Section 11 (A-110-112).

Revised Statutes of Missouri, 1969:

162.101-162.451 (A-112-133).

QUESTIONS PRESENTED

I

Whether the concept of "original sin" is applicable to desegregation cases so as to require the inclusion of a fully-integrated (over 41% Black) school district in a forced merger with a wholly-Black school district and a third and larger district which is less than 5% Black, because thirty-eight years ago the school district segregated itself.

II

Whether, in ordering school desegregation, the Courts may abolish school districts and order a tax increase without violating the Ninth and Tenth Amendments of the United States Constitution.

III

Whether a desegregation plan requiring merger of school districts provides equal protection of the laws under the Fourteenth Amendment when the effect of the plan will be the destruction of the racial balance that exists in one of the three districts involved, and whether the Court, in ordering school desegregation, should base relief upon pre-1954 conditions rather than present conditions.

IV

Whether, in light of recent sociological findings, a Court, in ordering desegregation, should select that plan which will reduce pupil transportation without minimizing desegregation.

STATEMENT

This action was brought in September, 1971, on behalf of the United States, pursuant to Section 407 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(c)(6), and the Fourteenth Amendment to the Constitution of the United States, against the State of Missouri, the St. Louis County Board of Education, Berkeley School District (hereafter referred to as "Berkeley"), Kinloch School District (hereafter referred to as "Kinloch") and Ferguson Reorganized School District R II (hereafter referred to as "Ferguson") and the superintendents of said districts and others, to desegregate Kinloch, a small, all-Black school district, having a current enrollment of 979 pupils, located in St. Louis County, Missouri. Petitioner, Berkeley, is now a substantially unitary school system with a 41% Black enrollment. (The racial composition of Berkeley schools is discussed *infra*, at p. 5.)

Before 1937 most of Berkeley and Kinloch were one school district known as "Kinloch School District No. 18" which then had 837 Black students and 609 White students (Tr. 56). Pursuant to Missouri law, the pupils in the old Kinloch School District No. 18 attended segregated schools (A-2).

In 1937 the predominantly White area of the Kinloch School District was incorporated as the City of Berkeley. Under a State statute a new school district, Berkeley, was formed nearly coterminous to the newly-incorporated city. The remainder of the old Kinloch School District No. 18 became present Kinloch (A-21).

In 1949 a school district reorganization plan known as the "First Revised Plan" was submitted to the voters in areas that presently constitute Berkeley, Kinloch and Ferguson (Tr. 242). The proposal to consolidate these districts received its strongest support in Berkeley (375 for and 25 against) and also received a majority in Kinloch. Since it was rejected in the larger Florissant area of the Ferguson District and resulted in a tie vote in the Ferguson city area of that district, the proposed consolidation did not take effect (A-3).

In 1959 Berkeley's Board of Education voluntarily annexed the nearly all-Black Scudder Elementary School District, a Black community West of Berkeley, separated from it by the St. Louis Airport (Tr. 418-420, A-152). The Smith Elementary School (the only one operated by the Scudder District) which has an enrollment of 113 and is 99% Black, is the only nearly all-Black school in Berkeley (Tr. 422, 423).

The following Table compares the enrollments and racial compositions of the three districts at the time suit was filed and for the 1974-75 school year.[1]

District	Total Enrollment	Percent Black
Kinloch		
1970-71	1,130	100
1974-75	979	100
Berkeley		
1970-71	5,040	20.8
1974-75	4,242	40.6[2]
Ferguson		
1970-71	18,889	2.4
1974-75	16,556	4.7

[1] Source: Stipulation filed December 12, 1974, Paragraph 5, Attachment 16.

[2] 44.08% as of May, 1975.

In 1970 the Black population of the City of Berkeley was 8.7%, whereas the Black enrollment in the Berkeley schools was then 20% (Tr. 499). Berkeley's Exhibit O-22 (A-153) shows the projected and actual changes in racial composition of the enrollments in Berkeley from 1967 through 1974 (Tr. 722-724). The northern and central portions of Berkeley are undergoing significant and rapid changes in racial composition and, according to sociological evidence submitted by Berkeley, a major portion of the White enrollment decline and out-migration of Whites from Berkeley has been due to the threat of school desegregation in this cause of action (Tr. 738, 739, 765). The tripling of the White loss rate in two years is similar to the White loss rate in Pasadena, Inglewood, Chattanooga, San Francisco and Denver at the time desegregation orders went into effect in those cities (Tr. 766). Ferguson has experienced a White decline of 2½% per year, about the same as St. Louis County as a whole, but this has increased in the past two years to about 5%, indicating that Ferguson has also been affected by this pending action, but to a far lesser extent than Berkeley (Tr. 766).

Kinloch is extremely small and its low assessed valuation has made it difficult to maintain a good school system (Tr. 103). However, because of state and federal financial assistance, Kinloch has been able to spend more per pupil in average daily attendance than eight of the twenty-four other school districts in St. Louis County (Tr. 111, 112, 118). Kinloch's assessed valuation is the lowest in St. Louis County and its high school enrollment is the smallest; these factors have adversely affected Kinloch's ability to provide quality education (A-3).

After a hearing held in July, 1972, the United States District Court entered Findings of Fact and Conclusions of Law on August 27, 1973 (A-16-35). The Court found racially-discriminatory State action in the splitting of the old Kinloch School District No. 18 (A-30). The Court found that the

failure to include Kinloch in reorganization plans and the rejection of the 1949 reorganization Plan resulted in the maintenance of Kinloch as a segregated district; that the creation and maintenance of Kinloch as a small, all-Black school district resulted in inferior funding, facilities and educational programs for the pupils in that district, and that the State and County defendants exercised their authority to reorganize the school districts of Missouri in such a way as to exclude Kinloch, because of the race of its students, from reorganization plans in violation of the Fourteenth Amendment (A-30-32). The District Court ordered the State and other defendants to develop a desegregation Plan (A-35).

Desegregation Plans

In the period between August, 1973 and October, 1974, various desegregation proposals were submitted to the District Court. The State Board of Education submitted its original Three-District Plan on November 21, 1973, and on May 2, 1974, pursuant to an Order of the District Court, the State Board of Education submitted an alternate Plan which would annex Kinloch to Ferguson, omitting Berkeley. Thereafter, Kinloch submitted a Plan that would consolidate Kinloch and Berkeley, omitting Ferguson.[3]

On October 4, 1974, the District Court ordered the State to update its original Three-District Plan and directed that it envision the annexation of Berkeley and Kinloch to Ferguson, that no new buildings be built and that busing be kept at a minimum (A-73). The State accordingly submitted an up-dated version of the Plan.[4] This Plan, with certain modifications, was ordered by the District Court on January 9, 1975.

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[3] Portions of these plans are contained in the Appendix, pp. 72-105.

[4] The Plan, abridged, is contained in Appendix, pp. 72-95.

The revised Three-District Plan calls for the assignment of one-third of the Kinloch Junior High pupils to Berkeley Junior High, which will thereby change from 37.2% to 41.7% Black; Berkeley Senior High will remain 29.9% Black. The Plan will change Berkeley's Holman Elementary School from 9.1% Black to 44.0% Black and Springdale Elementary School from 21.5% Black to 48.3% Black. These elementary schools will be grouped with the Kinloch Elementary School which will result in "cross busing" into Kinloch. Berkeley's Caroline Elementary School will change from 35.1% Black to 45.2% Black; Frostfield Elementary School will change from 70.5% Black to 44.0% Black under the Plan; Smith School will change from 99% Black to approximately 41% Black and the Airport School will remain 49.1% Black (A-42, 91).

The guidelines for this Plan were that it be administratively feasible, educationally sound, minimize transportation for desegregation purposes, deal primarily with the disestablishment of racial isolation in Kinloch and result in no schools over 50% non-White (Tr. 562).

A merger of Kinloch and Ferguson, omitting Berkeley, was rejected primarily because of financial reasons—i.e., the assessed valuation per pupil in average daily attendance (ADA) in these two districts would be $11,057.00 whereas the average in neighboring districts is $15,912.00 and the State average is just under $12,500 (Tr.564).[5] The enlarged district under the Three-District Plan would have an assessed valuation per pupil in ADA of $14,358.00. The other reason for not supporting a Kinloch-Ferguson merger was that the drafters of the Plan questioned the "legality" of omitting Berkeley (Tr.564). The objective of desegregating Berkeley was a reason why the Three-District Plan

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[5] Dr. Gordon Foster, who participated in the preparation of the Plan and expressed reservations about the Kinloch-Ferguson Plan for financial reasons, testified that he did not work on the financial aspects of the Plan (Tr.588).

was supported rather than the Kinloch-Ferguson Plan, though the latter would more easily and effectively accomplish the desegregation of Kinloch (Tr.604,605).

The budget under the Three-District Plan anticipates a $380,000.00 decrease in the projected ending balance (A-83), whereas under the Ferguson-Kinloch Plan the ending balance would increase by $319,500.00 (A-98). This is due to the fact that the combination of Ferguson and Kinloch would derive the highest apportionment of state aid of any of the proposed district combinations (Tr.648) and avoid the expense of raising salaries to the Berkeley salary level, which is substantially higher than Ferguson and Kinloch.

The Three-District Plan will concentrate the Black student population in the Berkeley and Kinloch areas, which will not have the effect of desegregating Kinloch because it will place Kinloch students in schools that will become majority Black (Tr. 770). This plan contemplates the busing of up to 2,030 addiional pupils (Tr. 580, 581). The Ferguson-Kinloch Plan would require busing of only 986 additional pupils (A-100).

REASONS FOR GRANTING THE WRIT

I

Presented in its simplest form, the question is indeed whether the concept of original sin applies. Is the separation of Berkeley and Kinloch, though lawful in 1937, *State of Mo. ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) actionable in 1975 on the basis of *Brown v. Board of Education*, 347 U.S. 483 (1954), thus disregarding all events transpiring since 1954?

If Berkeley were now 100% Black, there can be no doubt that the Courts would not order its inclusion in a plan to desegregate Kinloch. It, therefore, follows that at some point, due to passage of time and ensuing events, the 1937 violation would have become no longer actionable. In view of the testimony by its author that the Three-District Plan would not achieve racial stability in Berkeley (Tr. 595) and that the Kinloch-Ferguson Plan would more easily and effectively accomplish the desegregation of Kinloch (Tr. 604, 605), it becomes painfully obvious that the inclusion of Berkeley in the Plan is for the purpose of retribution.[6]

It would appear that the only basis for contending that the Kinloch separation in 1937 ripened into a post-1954 violation by Berkeley, is the argument that this "perpetuated" the segregated state of Kinloch. However, analysis of the racial makeup of the Kinloch School District No. 18 and the racial composition of Kinloch and Berkeley in recent years clearly leads to the conclusion that if Kinloch School District No. 18 had remained intact, it would not be a unitary system today, but instead a virtually all-black school district (Tr. 56).

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[6] The financial advantage of the alternate Ferguson-Kinloch plan is discussed infra, p. 16.

It is the *effect*—not the purpose or motivation—of a school district's action that is of significance in determining whether the action is discriminatory. *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972). Since the retention of the old Kinloch School District No. 18, boundaries would not have had the effect of desegregating Kinloch, the re-uniting of these districts in 1975 would not amount to a "reasonable, feasible and workable" method of disestablishing a state mandated dual system of education that existed with reference to Kinloch, 407 U.S. at 469, and would not "achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation" as was required in *Wright*, supra, at 468, and *Davis v. Board of Commissioners of Mobile County*, 402 U.S. 33, 37 (1972).

It is realistic and necessary for the Courts to consider present conditions and not merely past history in formulating relief in school desegregation cases. The people of Berkeley have by the 1949 election manifested a desire to eliminate the separate state of Kinloch, but their vote was frustrated by the Ferguson and Florissant voters. The annexation of the Black Scudder District in 1959 and the integration of nearly all the Berkeley schools in recent years is of greater significance than the events of 1937. These actions, coupled with the demographic changes which have converted Berkeley, which was 100% white following its formation in 1937, to an integrated school district 41% Black in 1975, have wrought vast and lasting changes. There is no rational basis for including Berkeley in any plan to desegregate Kinloch, unless it be that, having once sinned in 1937, the stain of that sin cannot be cleansed by time and events, but only by punishment. The concept of original sin was found odious even in scripture: "The son shall not bear the inequity of the father" (Ezekiel, 18.20), and as that concept is applied in this case by the Courts below it is equally odious, and tragically unnecessary.

II

The Court-ordered merger of previously separate and independent school districts, the appointment of school board members and authorization of a tax rate "deemed to have been approved by the voters" (A-40) to accomplish desegregation are matters of serious national importance involving rights under the Ninth and Tenth Amendments of the Constitution upon which this Court has not as yet rendered a definitive opinion.

The education of children is not a power delegated to the United States under the Constitution and, therefore, pursuant to the Tenth Amendment, it is a subject for State and local control in conformity with the Constitution. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). State laws that give the local voters the right to form, merge, annex and dissolve school districts;[7] to elect school board members;[8] and to determine tax rates are not discriminatory either in purpose or effect, and, pursuant to the Ninth Amendment should not, therefore, be disparaged or disregarded by the Courts. *Knapp v. Schweitzer*, 351 U.S. 371, 375 (1958).

One of the most perplexing and controversial matters to all parties herein has been the question of whether the Courts may set the tax rate in a school district. The Berkeley tax rate is raised from $3.80 to $5.38 per $100.00 under the Court-ordered desegregation Plan, a 40% increase.[9]

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[7] Missouri Revised Statutes, §§ 162.211, 162.221, 162.223, 162.441 and 162.451 (A-118ff).

[8] Missouri Revised Statutes, §§ 162.241, 162.261 and 162.361 V.A.M.S. 1969 (A-122ff).

[9] The District Court found the $5.38 per $100 of assessed valuation rate insufficient and set the rate at $6.03 throughout the new district (A-37). The Court of Appeals held that the District Court had the power to provide for the levy of taxes, but directed that the rate be reduced to $5.38 (A-14, 15).

Article X, § 11(b) and (c) of the Missouri Constitution requires a two-thirds (⅔) majority vote of the electorate to increase a school district's tax rate in excess of $1.25 per hundred (A-111). Even where the school districts have been merged through a voted annexation under Missouri law,[10] the existing tax rates in each district will continue in force until and unless changed by the voters. *State of Missouri ex rel. Ft. Osage School District v. Conley*, 485 SW2d 469 (Mo. App., 1972).

The establishment of the present $5.38 Ferguson rate uniformly throughout the enlarged district has been justified as an effort to provide the district with an adequate financial base. However, this Court has held that the courts should not intervene in matters of public school finance, even where the system results in lower expenditures for minority pupils. *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973). Although in *Griffin v. County Board of Prince Edward County*, 377 U.S. 218, 233 (1964), the Court required the supervisors to re-open a public school system that had been closed to avoid desegregation and ordered them to exercise their power to levy taxes which they had refused to levy, *Griffin* does not stand for the proposition that the Courts may determine the price that should be paid for public education.

The tax rate issue raises two other points that should be cause for concern: (1) the parents of the 1,724 Black students in Berkeley will, by a 40% tax increase, bear a disproportionate part of the cost of desegregating the Kinloch schools; and (2) the resident property owners in Berkeley, whose interests have not been specifically represented herein, will be deprived of property without due process of law.

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[10] Missouri Revised Statutes, § 162.441, V.A.M.S. 1969.

III

The failure of the lower Courts to recognize the importance of preserving the existing racial balance in a public school system is a serious matter of national significance that requires direction from this Court.

Experience has shown that demographic factors must be taken into account if a plan for desegregation is to be effective. In *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 14 (1971), this Court noted with concern the problem caused by demographic change in connection with school desegregation:

> "This process has been rendered more difficult by changes since 1954 in the structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had marked impact on school planning, sometimes neutralizing or negating remedial action before it was fully implemented."

In 1954 the objective of litigation of this type was to end the segregation that existed in many of the nation's public schools. Now, the objective would be twofold: (1) To eliminate the remaining areas of segregated schooling; and, (2) To preserve the integrated school systems that have developed since 1954.

In recent decisions the courts have regarded racial stability as an important factor in desegregation cases. In *U.S. v. Board of School Commissioners of Indianapolis*, 503 F2d 68, 79 (7th Cir. 1974), the Seventh Circuit Court of Appeals held that the district court properly took into account the reality of accellerated white exodus from areas with increasingly high Black enrollment. In *Morgan v. Kerrigan*, 509 F2d 580 (1st Cir., 1974), the Boston School Committee was criticized for opening a racially- balanced school with the knowledge that it would shortly become predominantly Black. And in *Hart v. Com-*

munity School Board, 512 F2d 37 (2nd Cir. 1974), the Second Circuit Court of Appeals, in affirming a "magnet" school desegregation plan, relied on a finding that a massive infusion of White students into a predominantly-Black attendance area would not work, since those white students would transfer out of the public school system within a short time.

The undisputed evidence in the instant case is that the Three-District Plan, adopted by the District Court and affirmed by the Eighth Circuit Court of Appeals, will upset the existing racial balance in the Berkeley area and cause it to become largely Black (Tr. 768). The only demographic study of the alternative desegregation plans received in evidence supports the combining of Kinloch and Ferguson, which would more effectively desegregate Kinloch and avoid upsetting Berkeley's racial balance (Tr. 772).

The desegregation of Kinloch with 979 Black pupils can obviously be effected with relative ease by its annexation to Ferguson with a student population of 16,556, which is less than 5% Black. To include Berkeley, a school district that is 41% Black and has 1,724 Black students, in order to aid desegregation is obviously unrealistic. Although the Three-District Plan will result in a school system that is 16% Black (A-76), the black pupils will be concentrated in the Berkeley and Kinloch areas (A-152). The purpose of this litigation must be the "meaningful assurance of prompt and effectual disestablishment of a dual system" of education, *Green v. County School Board, etc.*, 391 U.S. 430, 438 (1968), and not merely the substitution of one segregated school system for another. Inasmuch as a desegregation plan must be judged by its *effect*, not its purpose, *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972), any plan that combines Kinloch and Berkeley should be rejected.

Although the Court of Appeals observed that the Ferguson-Kinloch Plan was rejected principally because the assessed

valuation of the two districts in relation to the average daily attendance would be well below the county average and its chances for financial success would be questionable (A-11, 12), the District Court made no finding as to the comparative financial feasibility of the Ferguson-Kinloch Plan as contrasted with the Three-District Plan adopted. A memorandum of the State Department of Education shows that a combination of Kinloch and Ferguson would derive the highest apportionment of state aid of any of the proposed district combinations (Tr. 684, A-135).[11] The tax base of the Ferguson-Kinloch Plan of *$11,057.00* per pupil in ADA was described as insufficient by the drafters of the Three-District Plan. To arrive at this conclusion, they ignored the fact that the tax base of Ferguson has been *$11,497.00* per pupil in ADA, only *$440.00* more per pupil, *and* further ignored the opinion of all the expert witnesses that Ferguson operates an outstanding school district on that tax base. The difference in the tax base is so minimal as to erase any doubt that the Ferguson-Kinloch Plan is just as financially sound as present Ferguson.

Inasmuch as the Ferguson-Kinloch Plan in fact is a financially feasible Plan and one that will effectively desegregate Kinloch, the only remaining reason for not ordering this alternative Plan is the "legality" problem (Tr. 603) of the 1937 split. This was apparently an obstacle that bothered the drafters of the Plan and which the lower Courts found insurmountable, and, in rejecting the Ferguson-Kinloch Plan, they have exalted past history over present reality and applied the concept of original sin as pointed out in I, supra.

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[11] The substantial loss of state aid and the raising of the Ferguson and Kinloch salaries to the Berkeley level are serious financial disadvantages in the Three-District Plan (Tr.859,860). The elimination of these problems explains in part why the Ferguson-Kinloch Plan results in an increase in the ending balance of $319,500.00 as opposed to the Three-District Plan which anticipates a $380,000.00 decrease in its ending balance.

IV

A desegregation Plan that requires unnecessary transportation of pupils is contrary to the concern expressed by this Court as well as recent sociological findings and the Equal Educational Opportunities Act of 1974.

As noted above, the Court-ordered Three-District Plan requires more than twice the amount of additional busing as the alternative Ferguson-Kinloch Plan, even though the District Court had expressed concern that "busing of students shall be kept at a minimum" (A-73).

Reservations about extensive busing to accomplish desegregation were noted in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 30, wherein the Court stated:

> "An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process . . . It hardly needs stating that the limits on time and travel will vary with many factors, but probably none more than the age of students."

Another reason for keeping busing at a minimum is the evidence that busing and other forms of induced desegregation have accomplished little, if any, significant increase in academic achievement and social adjustment by minority pupils involved (Tr.357, 358, 778-781) but have contributed to instability in the racial composition of integrated communities (Tr.768).[12]

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[12] David J. Armor, Sociologist with the Rand Corporation, and contributor to the work, *On Equality of Educational Opportunity*, Random House, 1972, who has studied the effects of many desegregation efforts, testified at the hearing of January 6, 1975 (Tr.739) and his recent article *"The Evidence on Busing"* was offered as Berkeley's Exhibit V.

Sociological evidence has an historical role in the field of public school desegregation, and current findings should not be ignored by the Courts.

The Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1751, et seq. (A-107ff), reflects the concern of Congress with regard to perhaps the greatest and doubtless the most traumatic social problem of our time. Only where all other remedies are inadequate should resort be had to busing students out of their neighborhoods to accomplish desegregation (42 U.S.C. § 1755). It is, therefore, a serious error for district courts to order desegregation plans that require unnecessary transportation of pupils. The Ferguson-Kinloch Plan, aside from being superior financially (thus eliminating any need for a court-ordered tax rate) and better able to achieve meaningful desegregation in Kinloch, reduces the amount of busing to less than one-half (½) of that required by the Plan ordered by the District Court.

CONCLUSION

The desegregation Plan ordered by the District Court and affirmed by the United States Court of Appeals not only contains perplexing problems of highly questionable constitutionality, but includes Berkeley with no justification other than punishment for an act occurring in 1937, and will have the effect of upsetting the delicate racial balance in Berkeley, thus thwarting the very purpose of this action: the desegregation of Kinloch. It is of national importance that desegregation plans conform to the Constitution and not ride roughshod over innocently-enacted state laws, and it is of equal importance that such plans take into consideration the demographic and sociological facts as they now exist.

Respectfully submitted

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PROCEEDINGS SUBSEQUENT TO APPLICATION

On October 15, 1975, the Board of Education of the Ferguson-Florissant School District submitted to the United States District Court for the Eastern District of Missouri a Report concerning the implementation of the desegregation Plan, pursuant to the District Court's Order of January 9, 1975.

This Report notes that, because of "changing population patterns in the District," it is "virtually impossible in some areas to comply with student reassignment recommendations in the Plan," and specifically refers to the Berkeley School District's

Holman and Springdale Elementary Schools and the Berkeley Junior High.[1] Thus, the prediction of Berkeley's expert witness, David J. Armor, that the Three-District Plan will lead to resegregation in Berkeley, proves alarmingly accurate (Tr. 765, 766).

As shown on pages 4 and 5 of the Report, the new District is already experiencing unexpected financial problems due in part to the reduction in State aid resulting from the merger.[2] (The financial difficulties created by the Three-District Plan were discussed in Berkeley's Petition for Certiorari, page 16, footnote 11).

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[1] Pages 9, 10 and 11 of the Report attached as a Supplemental Appendix (A-1-A-2) to this Brief. This Report, together with the exhibits incorporated therein, is 1¾ inches thick and is not reproduced herewith in its entirety.

[2] Pages 4 and 5 and one of the introductory pages of the Report attached as Supplemental Appendix. (A-3-A-5). The financial problems resulting from raising the Ferguson and Kinloch salaries to the Berkeley level had not been encountered as of the filing of the Report.

ARGUMENT

I

The Government's argument concerns itself with the 1937 wrongdoing by a then all-white community and remains blind to the fact that the effect of the retribution to be exacted upon the community (not upon the original wrongdoers themselves) will have the result in 1975 of resegregating a 40/60% unitary school district into a predominantly Black district. By fastening its attention solely on the events that occurred in 1937, the Respondent has ignored the sociological effect of the Decree and the entire thrust of the arguments made by the Berkeley School District in its Petition for Certiorari, to-wit:

1. Should not present conditions be the primary concern of the courts?

2. May the courts order the merger of independent school districts and a tax increase without voter approval even where unneeded to accomplish desegregation?

3. Are not demographic and sociological factors of primary importance in desegregation plans?

4. Should not the courts consider the views of Congress and order desegregation plans that minimize busing?

The fact that Berkeley, one of the few integrated school districts in St. Louis County, is, because of its inclusion in the desegregation Plan, experiencing population changes that will upset the racial balance that it now possesses, and the fact that the inclusion of Berkeley in the Plan will not accomplish desegregation in the Kinloch District, are matters that have neither been contested by Respondent nor given consideration by the courts

below.[3] Should these facts be ignored simply because Berkeley was segregated in 1937? Is retribution the overriding concern in desegregation cases? Does this not run counter to the Court's edict that desegregation plans must take "into account the practicalities of the situation" and must be "reasonable, feasible and workable"? *Wright v. Council of the City of Emporia*, 407 U.S. 451, 468, 469.

Brown v. Board of Education, 347 U.S. 483, is a landmark not only in the development of American law but also in the Nation's social progress. Now, over twenty years later, the United States Department of Justice in the instant case is concerned more with an ancient wrong than with present reality. Respondent's argument that the "nature of the violation determines the scope of the remedy" (Respondent's Brief, pages 6 and 7) does not take into account present conditions that should be considered in determining the nature of the violation. This argument does not take into account the fact that the desegregation of Kinloch, with its 979 pupils, can be affected by its inclusion in the Ferguson District with a student population of 16,556 pupils, which is less than 5% Black, and that this cannot be aided, enhanced or expedited by adding thereto the 1,724 Black pupils from Berkeley. Nor does the Respondent's argument consider the fact that the Black residents of Berkeley, who constitute over 40% of the school population there, outnumbering the pupils in Kinloch by two-to-one, are, because of the desegregation Plan, to be deprived of the right to live and be educated in an integrated community, and at the same time be subjected to a substantial increase in their property taxes, all because of a matter that occurred in 1937, over which they had no control.

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[3] Cf. Joint Appendix, pages 5, 7, 11 and 12.

II

Respondent's cavalier disregard of the Missouri Constitution, which requires voter approval of school tax increases,[4] is expressed in the footnote that concludes its Brief. The contention that the Court-ordered tax increase is constitutionally permissible because it was "recommended by the state and county defendants" is an incredibly simplistic treatment of a subject to which this Court devoted 137 pages (*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1).

The Government offers no discussion of *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 232-234, upon which it relies to support the proposition that courts may order a tax increase to help implement desegregation plans. The judgment ordering the Prince Edward County "Supervisors to exercise the power *that is theirs* to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia" (l.c. 233, emphasis added) is no authority for the Court of Appeals to affirm an Order that takes from the voters in the Berkeley School District a right that they possess under a provision in the Missouri Constitution that is not discriminatory in purpose or in effect.

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[4] Missouri Constitution, Article X, §§ 11(b) and (c); discussed in Berkeley's Petition, page 13.

CONCLUSION

The Petition for Writ of Certiorari, heretofore filed by Berkeley School District, et al., should be granted.

Respectfully submitted

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PUPIL ASSIGNMENT

Changes in Pupil Assignment

The District administrative staff is developing a Student Reassignment Plan designed to meet the provisions of the Revised State Plan and the Court Order of January 9. A pupil reassignment directory is being developed for each attendance area affected by the Plan which will show the student's name, street address, grade level, and present school attendance area. This directory will be updated throughout the current school year to show changes in enrollment and racial composition in each attendance area. In planning for student reassignment for the 1976-77 school year, the administrative staff will follow the pupil reassignment requirements set forth in the Revised State Plan as modified by the Court. Since the time the Plan was developed, changing population patterns in the District have made it virtually impossible in some areas to comply with the student reassignment recommendations of the Plan and at the same time meet the requirements for maintaining racial balance. It is no longer possible, for example, to redraw the attendance boundaries in the Kinloch Elementary, Holman, and Springdale attendance areas so that the percentage of non-white students in each of these three schools is between 35 and 45 percent. The percentage of non-white students attending Berkeley Junior High has also been steadily increasing and as of this September is 46 percent of the total population of the school. If one-third of the students at Kennedy Junior High are transferred to Berkeley Junior

High, the possibility exists that the school over a short period of time may become segregated. Also, if at the time this reassignment of students is made the non-white enrollment of Berkeley Junior High is in a majority, the transfer of additional non-white

students into the school would violate the Student Transfer Policy established by the January 9 Court Order. Other difficulties are presented by the Pupil Assignment section of the Revised State Plan. According to the Plan, for example, Smith Elementary School is to be paired with Caroline School and become a 5th-6th grade center. It is also to receive fifth and sixth grade students in the Frostfield attendance area living west of Graham Road. Given that the enrollment of both Smith and Caroline Schools has been steadily declining and the fact that there are no fifth and sixth grade students in the Frostfield area living west of Graham Road, it is unlikely that Smith School will be able to maintain the necessary enrollment to achieve any measure of racial balance. These and similar circumstances as they develop will have to be taken into account by the District staff in planning the implementation of the Pupil Assignment section of the Revised State Plan. Nevertheless, the administrative staff whenever possible will follow the recommendations on pupil reassignment set forth in the Revised State Plan and the Court Orders of January 9 and June 7. The staff understands that in granting the District flexibility in its authority to make student assignments, the Court prohibited deviation from the Revised State Plan which would result in a lesser degree of integration in any school than

projected under the Plan. The Biracial Advisory Committee which will take a direct role in the implementation of the Student Assignment section of the Plan is also aware of this limitation.

INTRODUCTION

A preliminary budget for the enlarged District for 1975-76 was developed by representatives from the three former districts. That preliminary budget, which was approved by the Board of Education on August 13, 1975, showed an anticipated operational deficit in excess of $400,000. The recent reduction in State appropriations for public school districts in Missouri, however, resulted in a further reduction in State revenue for 1975-76. This change is reflected in the Revised Budget which was adopted by the Board on October 8, 1975. That budget shows total estimated expenditures of $30,866,401.73 against total anticipated receipts of $30,031,-985.43, resulting in an operational deficit of $834,416.30. Included in the Revised Budget are funds for Kinloch area schools for additional staff, the purchase of needed textbooks and instructional materials, and other necessary improvements in the Kinloch educational program which will qualify those schools for AAA accreditation. The Board of Education has also established within the provisions of the applicable statute and the decision of the U. S. Court of Appeals a tax rate of $5.38 per hundred dollars assessed valuation. The tax rate was certified by the Board in July, 1975 to the Department of Revenue of St. Louis County.

GOVERNANCE AND FINANCING

1975-76 Budget

Under the direction of the Superintendent, a unified budget for the enlarged District was developed for the 1975-76 school year. That budget was adopted by the Board on August 13, 1975. Representatives from all three former districts worked on the formulation of the combined budget. To a large extent, it represents a combination of the budgets developed individually by the three districts for the 1975-76 year. The merger of the three districts, however, resulted in a loss of approximately

$350,000 in State Aid and anticipated receipts had to be revised downward. It was also necessary to increase expenditures in some areas to meet the requirements of the Revised State Plan. The expenditures for the Kinloch Schools were also increased by approximately $400,000 in order to provide for needed equipment, textbooks and instructional materials as well as additional staff. The loss of State Aid coupled with a necessary increase in expenditures made a balanced budget impossible. The budget approved by the Board in August showed an anticipated operational deficit in excess of $400,000. The recent reduction in State Appropriations for Public Education will cause a further reduction in State revenue and increase this deficit to nearly $800,-000. These changes are reflected in the Revised Budget accompanying this Report (see Appendix G). Also accompanying this Report is a copy of the Application for State School Money which was submitted on behalf of the enlarged District for the 1975-76 budget year (see Appendix H). School

districts in Missouri must submit this Application annually between June 15 and June 30 to the State Department of Education. The combined application of the enlarged District was approved by the Board on June 11.

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